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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ISAAC JUSTINIANO, 01B0601,

Petitioner,

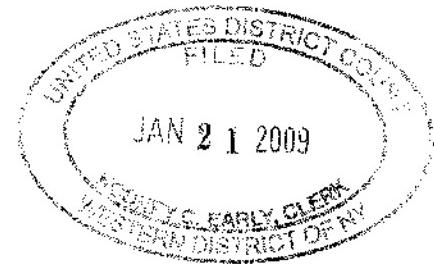
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DECISION AND ORDER  
09-CV- 6011L, 07-CR-6024L

DISTRICT COURT OF THE STATE OF NEW YORK,  
WESTERN DISTRICT OF NEW YORK,

Respondent.

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Petitioner *pro se* Isaac Justiniano ("Justiniano") has filed a petition on forms provided by the Court for filing a petition under 28 USC § 2254, for Writ of Habeas Corpus by a Person in State Custody, and requests *in forma pauperis* status. For the reasons discussed below, petitioner's request to proceed as a poor person is granted and the complaint is dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

The Court must dismiss an action if it (i) is frivolous or malicious; or (ii) fails to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(a); see also *Abbas v. Dixon*, 480 F.3d 636 (2d Cir. 2007). This is such a case.

The papers submitted by petitioner relate only to a criminal charge currently pending before the United States District Court for the Western District of New York. As such, although petitioner is currently in state custody at the Cayuga Correctional Facility, this petition is not properly brought pursuant to 28 USC § 2254 because petitioner is not challenging his state court conviction.<sup>1</sup>

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<sup>1</sup>The Court takes judicial notice of the facts contained in the New York State Department of Correctional Services Inmate Information website, which indicates that petitioner is in New York State custody pursuant to a return from parole or conditional release on a sentence for convictions for criminal sale of a controlled substance and criminal possession of a controlled substance.

The matters about which Justiniano complains relate to pretrial proceedings in a pending criminal case in this court which is scheduled for trial on February 9, 2009. Justiniano may not even file a direct appeal from such pretrial rulings until there is a final order in the case which, should he be convicted, would be a Judgment and Commitment Order. Then, and only then, could Justiniano file a direct appeal. Only then, once a direct appeal has been exhausted, could he even petition for a writ pursuant to 28 U.S.C. § 2255.

Justiniano has not been convicted in this United States District Court and, therefore, the petition filed by him is without merit and is dismissed as frivolous.

IT IS SO ORDERED.



DAVID G. LARIMER  
United States District Judge

DATED: January 21, 2009  
Rochester, New York